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In The

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Supreme Court

of the United States

October Term, 1996

IN RE: THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION NETWORK, INC.,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below properly held that the press and public have no First Amendment interest in attending a summary jury trial in a civil case because such a jury trial is not a trial but is instead "essentially a settlement proceeding"?

PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

The Cincinnati Enquirer, a division of Gannett Satellite Information Network, Inc., a wholly owned subsidiary of Gannett Co., Inc.

United States District Court for the Southern District of Ohio (Spiegel, J.)

Plaintiffs, Darrin E. Morris and Eugene Adams, on behalf of themselves and all certified class members, in the underlying action *In Re Southern Ohio Correctional Facility*, No. C-1-93-436 (S.D. Ohio)

Defendant, George Voinovich, individually and in his official capacity as the Governor of the State of Ohio, in the underlying action *In Re Southern Ohio Correctional Facility*, No. C-1-93-436 (S.D. Ohio)

Defendant, Reginald Wilkinson, individually and in his official capacity as an employee of the State of Ohio (Director of the Ohio Department of Rehabilitation and Correction), in the underlying action *In Re Southern Ohio Correctional Facility*, No. C-1-93-436 (S.D. Ohio)

Defendant, Arthur Tate, Jr., individually and in his official capacity as an employee of the State of Ohio (Warden, Southern Ohio Correctional Facility from 1990 to December, 1993), in the underlying action *In Re Southern Ohio Correctional Facility*, No. C-1-93-436 (S.D. Ohio)

Defendant, Terry Collins, individually and in his official capacity as an employee of the State of Ohio (Warden, Southern Ohio Correctional Facility from January, 1994 to Present), in the underlying action *In Re Southern Ohio Correctional Facility*, No. C-1-93-436 (S.D. Ohio)

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In The

Supreme Court

of the United States

October Term, 1996

IN RE: THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION NETWORK, INC.,

Petitioner.

Petitioner *The Cincinnati Enquirer* respectfully requests that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit, entered in the above-captioned proceeding on August 1, 1996, denying the *Enquirer's* petition for writ of mandamus.

OPINIONS BELOW

The June 6, 1996 order of the United States District Court for the Southern District of Ohio denying the *Enquirer's* motion for permission to attend the summary jury trial is not reported and is reproduced in the Appendix at 12a. The June 7, 1996 order of the United States Court of Appeals for the Sixth Circuit prohibiting the district court from conducting the trial unless the public was permitted to attend it, pending consideration of the *Enquirer's* petition for writ of mandamus by the full court, is

reported at 85 F.3d 255 and is reproduced in the Appendix at 8a. The June 7, 1996 order of the district court, permitting the public to attend the summary jury trial, is not reported and is reproduced in the Appendix at 6a. The June 10, 1996 order of the Sixth Circuit in the companion case *In re Voinovich*, No. 96-3635 (6th Cir.), prohibiting the district court from conducting the summary jury trial, is not reported and is reproduced in the Appendix at 31a. The August 1, 1996 order of the Sixth Circuit denying the *Enquirer's* petition for writ of mandamus is reported at 94 F.3d 198 and is reproduced in the Appendix at 1a. The August 1, 1996 order of the Sixth Circuit, dismissing the petition for writ of mandamus in the companion case as moot, is not reported and is reproduced in the Appendix at 29a. The August 14, 1996 order of the Sixth Circuit denying the *Enquirer's* request for a stay pending determination of its petition for rehearing is not reported and is reproduced in the Appendix at 35a. The September 30, 1996 order of the Sixth Circuit denying the *Enquirer's* petition for rehearing and suggestion for rehearing *en banc* is not reported and is reproduced in the Appendix at 34a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit entered its order denying the *Enquirer's* petition for writ of mandamus on August 1, 1996. On September 30, 1996, the Sixth Circuit denied the *Enquirer's* timely petition for rehearing and suggestion for rehearing *en banc*. This petition for certiorari was filed within 90 days of that date. The jurisdiction of

this Court is invoked pursuant to 28 U.S.C.A. § 1254 (1993).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

STATEMENT OF THE CASE

This case arises out of *In re Southern Ohio Correctional Facility*, No. C-1-93-436 (S.D. Ohio), a class action resulting from the April 1993 riots at the Southern Ohio Correctional Facility in Lucasville, Ohio. The plaintiff class—inmates who did not participate in any portion of the riots—seeks compensatory damages and injunctive relief. The inmates allege that the defendant state officials failed to protect them, in violation of their Eighth Amendment rights, by permitting overcrowding in the prison system. The riots were the most violent in Ohio's history. The public has a strong interest in learning about the Lucasville riots and that interest has been served by *Enquirer* news reports on the class action litigation. The United States District Court for the Southern District of Ohio ordered the parties to the class action to participate in a summary jury trial. At

the request of the defendants, the court ordered the trial closed to the press and the public.

On June 6, 1996, shortly before the summary jury trial began, the *Enquirer* moved the district court for permission to attend it. The district court denied the newspaper's request on June 6, 1996 after a brief argument. (Appendix at 25a-26a).

The *Enquirer* immediately sought a writ of mandamus, from the United States Court of Appeals for the Sixth Circuit, requiring the district court to open the trial to the public. On June 7, 1996, Chief Judge Merritt—finding it "contrary to centuries of Anglo-American jurisprudence to conduct jury trials in secret"—enjoined the district court from conducting the summary jury trial without permitting the public to attend it, pending consideration of the mandamus petition by the full court. *In re The Cincinnati Enquirer*, 85 F.3d 255, 256 (6th Cir.1996), *vacated*, 94 F.3d 198 (6th Cir. 1996) (Appendix at 10a). The district court consequently resumed the trial in open court with *Enquirer* reporters present. (Appendix at 39a).

The class action defendants then filed a second petition for writ of mandamus, and in response the Sixth Circuit ordered the summary jury trial stopped altogether. *In re Voinovich*, No. 96-3635 (6th Cir.1996). (Appendix at 31a). On August 1, 1996, the Sixth Circuit held that there was no First Amendment interest in attending a summary jury trial, denied the *Enquirer's* mandamus petition and vacated Chief Judge Merritt's previous order. In re *The Cincinnati*

Enquirer, 94 F.3d 198, 199 (6th Cir. 1996) ["*Enquirer II*"] (Appendix at 3a-5a). The class action defendants' mandamus petition was denied as moot. (Appendix at 29a-30a). The *Enquirer* timely sought rehearing and a stay of the trial. The Sixth Circuit denied a stay on August 14, 1996 (Appendix at 36a), and the summary jury trial resumed.[1] (Appendix at 44a). On September 30, 1996, the Sixth Circuit denied the *Enquirer's* petition for rehearing (Appendix at 34a), and the *Enquirer* timely filed this petition for writ of certiorari.

The basis of federal jurisdiction in the first instance is 28 U.S.C.A. § 1331 (1993) in the district court, and 28 U.S.C.A. § 1651 (1994) in the court of appeals.

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[1] The fact that the summary jury trial has been completed does not render this proceeding moot. The underlying dispute is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). This appeal meets the two necessary conditions to avoid mootness: the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and there is a reasonable expectation that the *Enquirer* will be subjected to the same action again. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 377 (1979), *quoting Weinstein v. Bradford*, 423 U.S. 147 (1975). In addition, a transcript of the trial remains sealed. (Appendix at 21a).

REASONS FOR GRANTING THE WRIT

1. The Public Has a Great Interest in Attending Civil Trials

The Sixth Circuit Court of Appeals held that the press and public have no First Amendment interest in attending a summary jury trial in a civil case, because a summary jury trial is not a trial but is instead "essentially" a settlement proceeding. *Enquirer II*, 94 F.3d at 99 (Appendix at 3a-5a). As a consequence, a private jury trial—in which federal jurors were presided over by a federal judge in a federal courthouse—assessed the conduct of Ohio state officials during the bloodiest prison riot in that state's history. The Court of Appeals excluded both the public and the press from the trial, notwithstanding that the trial may be the only meaningful opportunity to learn about the conduct of Lucasville prison officials. The Court of Appeals refused to recognize any First Amendment right of access to the trial, notwithstanding that the jury evaluated the conduct of public officials during an event of the most extraordinary public interest and concern. The strong public interest in the class action litigation, and the profound and timely social issues raised by the claims in that case, suggest that this Court should address and recognize the First Amendment right of access rejected out of hand by the court below.

2. The Opinion of the Court Below is Erroneous

The holding below is utterly at odds with the principles of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ["*Press-Enterprise I*"]; and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ["*Press-Enterprise II*"]. The public enjoys a First Amendment the right of access to a court proceeding when: (1) the proceeding is one for which there has been "a tradition of accessibility;" and (2) "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8.

The "tradition of accessibility" to judicial proceedings recognized by this Court in criminal cases extends to civil trials generally and to summary jury trials in particular.[2] Summary jury trials are *called* jury trials because they *are* jury trials. A summary jury trial has all essential indicia of a full-scale jury trial in a United States district court:

- the trial is adversarial in nature. All parties are represented, and present their best case to the jury;

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[2] Even were a summary jury trial to be viewed as having no direct historical counterpart, its importance to the civil process indicates that the traditional right of access should apply. *Press-Enterprise II*, 478 U.S. at 10, n.3. *See In re Globe Newspaper Co.*, 729 F.2d 47, 51 (1st Cir. 1984).

- the case is tried in a federal courtroom;

- there is a jury, selected after *voir dire* and challenges to the venire;[3]

- a United States District Judge or Magistrate Judge is present and presides throughout the trial;

- the jurors are summoned to the court, selected from the regular jury pool and paid with public funds;

- opening and closing statements are made, followed by the presentation of evidence, including videotaped testimony or live testimony of critical witnesses in some cases;

- documentary evidence is admitted, and the Federal Rules of Evidence apply;

- the jury is charged, deliberates and renders a verdict based upon the evidence that has been received, and the verdict is announced by the court;

- the court may require counsel to submit trial memoranda, proposed *voir*

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[3] "The process of selection of jurors has presumptively been a public process." *Press-Enterprise I*, 464 U.S. at 505.

dire questions, jury instructions and motions in limine;

- exhibit lists and lists of witnesses are submitted; and

- the parties may agree that the verdict is binding.[4]

CPR INSTITUTE FOR DISPUTE RESOLUTION, JUDGE'S DESKBOOK ON COURT ADR, in 12 ALTERNATIVES TO HIGH COST LITIGATION 9 (1994). The summary jury trial is effective only if it "maintain[s] the aura" of an actual trial. Hon. Thomas D. Lambros, *The Summary Jury Trial, A Report to the Judicial Conference of the United States*, 103 F.R.D. 461, 470-71 (1984). *See also* A. Cohn, *Summary Jury Trial—A Caution*, 1995 J. DISP. RESOL. 299, 300 (1995) (unless summary jury trial retains essential character of full-scale trial, it "will not offer [the parties] the insight [they] seek.").

Civil jury trials are traditionally open to the public. *Richmond Newspapers*, 448 U.S. at 580, n.17. That tradition fully applies to a summary jury trial because it is, in fact, a trial. "A trial is a public event. What transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947).

Similarly, public attendance at summary jury trials can play a positive role in their functioning and

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[4] *See e.g., Associated Pennsylvania Constructors v. Jennetta*, 738 F. Supp. 891, 895 (M.D. Pa. 1990); *Koussan v. Farmers Ins. Exch.*, 1987 U.S. Dist. LEXIS 15410 at *1 (W.D. Mich. 1987).

in the functioning of the civil justice system. A "trial courtroom . . . is a public place where people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." *Press-Enterprise II*, 478 U.S. at 8. In considering this second element of the First Amendment analysis, this Court looks not at the particular event before it (*e.g.*, a preliminary hearing in a criminal matter), but rather the broader process (*i.e.*, the criminal justice system) of which the event is a part. *Press-Enterprise II*, 478 U.S. at 12. Similar to the criminal preliminary hearing considered in *Press-Enterprise II*, the summary jury trial "is often the final and most important step" in a civil case, and may provide the "sole occasion for public observation" of the civil justice system. *Id.; see* Lambros, 103 F.R.D. at 472; Ann E. Woodley, *Saving The Summary Jury Trial: A Proposal To Halt The Flow Of Litigation and End The Uncertainties*, 1995 J. DISP. RESOL. 213, 219, n. 24 & 62 (1995). Openness therefore not only enhances the fairness of the civil justice system, but contributes to the appearance of fairness so necessary to the public's confidence in the judicial system. *Press-Enterprise II*, 478 U.S. at 13.

Public access to summary jury trials would realize core First Amendment values:

- Public access would fulfill the public's *supervisory function* by enhancing trial quality, safeguarding the integrity of the process, fostering an appearance of fairness and serving as a

check upon the judicial process. *Globe Newspaper*, 457 U.S. at 606; *Press-Enterprise I*, 464 U.S. at 508-09.

- Public access would similarly fulfill the *educative purpose* of the First Amendment by apprising the public of critical events and "assuring freedom of communication on matters relating to the functioning of government." *DePasquale*, 443 U.S. at 412 (Blackmun, J., concurring in part and dissenting in part); *Richmond Newspapers*, 448 U.S. at 575. *See Pell v. Procunier*, 417 U.S. 817, 835 (1974) (conditions in prisons are clearly "of great public importance").

- Public access can enhance the litigation process itself, by facilitating witnesses to come forward to add their evidence and assist the court to reach a more just and truthful result. *DePasquale*, 448 U.S. at 383.

The court below rejected any First Amendment right of access to a summary jury trial by labeling it as "essentially a settlement proceeding." *See Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989). While it is true that the purpose of a summary jury trial can be narrowly described as encouraging settlement, much the same can be said about a full scale jury trial, where settlement frequently follows the verdict. Nevertheless, "the First Amendment question

cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the preliminary hearing [or here, summary jury trial] functions much like a full-scale trial." *Press-Enterprise II*, 478 U.S. at 8. The Court of Appeals' talismanic rejection of the public's important First Amendment right was incorrect and should be addressed by this Court.

The court below misperceived the nature of the summary jury trial not only by ignoring the characteristics and values described above, but by completely overlooking the core rationale underlying the summary jury trial's utility. The summary jury trial is useful because it is an actual trial:

> [T]he [summary jury trial] is inherently different [from traditional alternative dispute resolution techniques]. This difference initially manifests itself in the fact that [summary jury trial] is *the only alternative dispute resolution technique which utilizes the age old jurisprudential concept of trial by jury*. It is this concept, the expression of opinion by a jury of peers, which has molded our judicial system and which permits the parties to believe that their story has been told, and a decision reached. No other alternative allows for the use of this basic foundation of our present system.

Lambros, 103 F.R.D. at 468 (emphasis added). The summary jury trial works only if it has "the aura of

actual trial." *Id.* at 470 (emphasis added). Indeed, unless it retains the essential character of a full-scale trial, the summary trial "will not offer [the parties] the insight [they] seek." Cohn, 1995 J. DISP. RESOL. at 300. For this reason the jurors are deliberately led to believe that the proceeding is, in fact, the trial of the case. *Id.*; JUDGE'S DESKBOOK at *13.

Finally, the First Amendment right of access cannot be overcome unless "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 14, *quoting Press-Enterprise I*, 464 U.S. at 501-10 ; *see also Globe Newspaper*, 457 U.S. at 606-07. Here, because the Sixth Circuit rejected any First Amendment interest, the courts below made no finding to support the secrecy order, and indeed the district court acknowledged "that the public has a strong interest in litigation of this kind." (Appendix at 6a)

3. There is a Pressing Need for a Ruling by this Court

The issue presented in this case has potential consequences that reach far beyond the particular summary jury trial that took place in Cincinnati. The use of summary jury trials to dispose of civil cases in United States district courts is part of the necessary and growing trend toward alternative dispute resolution ["ADR"]. The Civil Justice Reform Act of 1990 ["CJRA"] mandates that all district courts develop a district-specific plan to reduce cost and delay

in civil litigation. Civil Justice Reform Act of 1990, 28 U.S.C.A. §§ 471-82 (1993). ADR is one of the six civil case management principles recommended by the CJRA. The summary jury trial has been adopted in over 50% of the judicial districts. ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENTS IN THE FEDERAL DISTRICT COURT (1996). The holding below permits civil jury trials reflexively to be held in secret so long as they are intended to expedite settlement of civil litigation, and raises the specter of secret civil jury trials, ever increasing in number, throughout the country.

The rationale of the holding below also raises the threat of secrecy enshrouding other elements of the civil litigation process. A summary jury—which advises the court and the litigants of the likely verdict—is functionally equivalent to an advisory jury, as provided by Federal Rule of Civil Procedure 39(c). Rule 39(c) codifies a tradition that extends back to the practice of American courts at the time of the ratification of the United States Constitution. Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363, 1364 (1987). Chancellors in courts of equity had discretion to appoint an advisory jury to "enlighten the conscience of the Court." *Id.* The advisory jury's decision then, and now, is similarly non-binding and non-adjudicatory. There has been little doubt traditionally that advisory jury trials are presumptively public proceedings. The holding below poses a direct threat to that presumption.

Indeed, settlement discussions and negotiations routinely take place in connection with full-scale trials,

and settlement frequently follows the jury's verdict. The rationale of the Court of Appeals' opinion can therefore trump the First Amendment and justify secret full-scale trials.

Finally, the dynamics of the litigation process, coupled with the holding below, can only result in greater secrecy throughout the civil process. Parties to litigation frequently seek confidentiality simply to avoid public scrutiny or notoriety. Judges are reluctant to resist the joint requests of counsel in such matters unless there is a countervailing interest upon which that resistance can be based. If there is no First Amendment interest in attending a jury trial such as that at issue in this case, there can hardly be a constitutional reason to maintain the public nature of most of the civil process.

The opinion below is predicated on the proposition that settlement proceedings are historically closed procedures. This case involves a trial, however, and not the settlement discussions that may take place ancillary to it. The *Enquirer* did not claim a right of access to settlement discussions in chambers, *ex parte* case assessments, or other activities that are traditionally part of "settlement" negotiations. Unlike the summary jury trial, those latter events do not possess the central characteristics of a full-scale trial, and public access to them may be fundamentally incompatible with their essential nature. The overriding factor which separates the summary jury trial from those other settlement procedures, and which demonstrates the error in the holding below, is the utilization of "the age old jurisprudential concept

of trial by jury." Lambros, 103 F.R.D. at 468. The use of a federal courtroom, a federal judge, and a federal jury to conduct a trial, even if abbreviated, triggers the public's First Amendment right of access.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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In re the CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION, INC., Petitioner.

No. 96-3627.

United States Court of Appeals, Sixth Circuit

Submitted July 30, 1996.

August 1, 1996*

Newspaper petitioned for writ of mandamus to require district court judge to permit public access to summary jury trial in class action arising from prison riots. The Court of Appeals held that newspaper failed to demonstrate First Amendment right of access to summary jury trial in case.

Petition denied.

1. Constitutional Law -90.1(3)

First Amendment right of access did not attach to summary jury trial ordered to facilitate settlement of class action arising from riots that occurred at correctional facility. U.S.C.A. Const.Amend.1.

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* This order was originally issued as an "unpublished order" filed on August 1, 1996.

2. Constitutional Law -90.1(3)

Analysis of First Amendment right to access claim involves consideration whether proceeding is one for which there has been "tradition of accessibility," and whether access plays significant positive role in functioning. U.S.C.A. Const.Amend.1.

3. Federal Civil Procedure -2252

"Summary jury trial" proceeding is not in nature of court hearing or jury trial, but is essentially settlement proceeding, which are historically closed procedures.

See publication Words and Phrases for other judicial constructions and definitions

4. Constitutional Law -90.1(3)

Where party has legitimate interest in confidentiality, public access would be detrimental to effectiveness of summary jury trial facilitating settlement. U.S.C.A. Const.Amend.1.

5. Mandamus

Remedy of mandamus is drastic one, to be invoked only in extraordinary situations where petitioner can show clear and indisputable right to relief sought.

John A. Flanagan, Cincinnati, OH, John C. Greiner, Graydon, Head & Ritchy, Cincinnati, OH, for Petitioner

Before: GUY, RYAN, and SUHRHEINRICH, Circuit Judges.

ORDER

In *In re Southern Ohio Correctional Facility*, No. C-1-93-436 (S.D. Ohio), a class action arising from riots that occurred at the Southern Ohio Correctional Facility in April of 1993, the district court ordered the parties to participate in a summary jury trial in an attempt to obtain a settlement of the action. The petitioner came before this court seeking a writ of mandamus requiring the district court to permit public access to the summary jury trial. On June 7, 1996, a single judge of the court, acting on an emergency basis, issued a temporary injunction prohibiting the district court from conducting the summary jury trial proceedings without permitting public access pending consideration of the petition by the court. *In re Cincinnati Enquirer*, 85 F.3d 255 (6th Cir. 1996). The district court then continued the proceedings in opened court and the defendants filed a petition for a writ of mandamus seeking to vacate the summary jury trial proceedings. *In re Voinovich*, 92 F. 3D 383 (6th Cir. 1996).

[1,2] The district court did not err in closing the summary jury trial to the public. As we held in *Cincinnati Gas and Electric Co. v. General Electric*

Co., 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 489 U.S. 1033, 109, S. Ct. 1171, 103 L.Ed.2d 229 (1989), the first amendment right of access does not attach to a summary jury trial. Analysis of a first amendment right to access claim involves two complimentary considerations. First, the proceeding must be one for which there has been a "tradition of accessibility." *Press-Enterprises Co. v. Superior Court,* 478 U.S. 1, 10, 106 S.Ct. 2755, 2741, 92 L.Ed.2d. 1(1986); *Cincinnati Gas and Electric Co. v. General Electric Co.*, 854 F.2d at 903. The second consideration is whether the access "plays a significant positive role in the functioning of the particular process in question." *Press-Enterprises Co. v. Superior Court*, 478 U.S. at 8, 106 S.Ct. at 2740.

[3,4] A summary jury trial proceeding is not in the nature of a court hearing or a jury trial, but is essentially a settlement proceeding. Settlement proceedings are historically closed procedures. *Cincinnati Gas and Electric Co. v. General Electric Co.*, 854 F.2d at 903. The summary jury trial does not present any matter for adjudication by the court, but functions to facilitate settlement. This court has found that "where a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement." *Cincinnati Gas and Electric Co. v. General Electric Co.*, 854 F.2d at 904.

[5] "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." *In re American President Lines,*

Ltd., 929 F.2d 226, 227 (6th Cir. 1991) (order); *see In re NLO, Inc.*, 5 F.3d 154, 156 (6th Cir. 1993). The petitioner has failed to demonstrate a right to access to the summary jury trial in this case. Consequently, it is not entitled to a writ of mandamus. The prior order in this case, to the extent that it holds to the contrary, is vacated.

It therefore is ORDERED that the petition for a writ of mandamus is denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE SOUTHERN OHIO	:	Case No.
CORRECTIONAL	:	C-1-93-436
FACILITY	:	
	:	ORDER

This matter is before the Court on the June 7, 1996, Order, Case No. 96-3627 ("In re: the Cincinnati Enquirer, a division of Gannett Satellite Information, Incorporated") from the United States Court of Appeals for the Sixth Circuit.

In that order, Chief Judge Merritt requested this Court to respond to the Cincinnati Enquirer's petition of mandamus.

This case involves the 1993 prison riot at the Southern Ohio Correctional Facility in Lucasville, Ohio. At the request of the Defendants, the Court barred the press and the public from the proceedings, because summary jury trials, unlike regular trials, are purely settlement techniques. Chief Judge Merritt indicated that the strong public interest in this litigation demands that we either cease the proceedings until the Court of Appeals can determine whether we can order the proceedings closed or grant the public access to the summary jury trial. We agree with Chief Judge Merritt that the public has a strong interest in litigation of this kind. Accordingly, we ORDER that the proceedings be made public for the remainder of the summary jury trial, and thus, now find this issue to be MOOT.

The Defendants expressed a concern that if the proceedings were to go forward they would be unfairly

prejudiced because the Plaintiffs' testimony would be uncontested until next week. Traditionally, in a summary jury trial the Plaintiffs first present their entire case, and then the Defendants present their entire case. The Court has restructured the summary jury trial to alleviate the Defendants' concerns. In this case, the Plaintiffs will present all of their evidence on the first issue on the morning of Friday, June 7. Next, the Defendants will present their evidence on the same issue on the afternoon of Friday, June 7. Next week, the Court will continue with the same format allowing each side to present evidence on a particular issue on the same day. Such a procedure should allay any concerns of prejudice by the Defendants.

Finally, Chief Judge Merritt noted in his order that we ordered the summary jury trial to go forward against the wishes of the Defendant. The Chief Judge, however, stopped short of ordering us to discontinue the proceedings. If the Sixth Circuit intends to revisit the issue of whether this Court has the authority to proceed against the wishes of one of the parties, we respectfully cite them to our April 24, 1996, Order. In re Southern Ohio Correctional Facility, --- F.R.D. ---, 1996 WL 229134, Document 129 (S.D. Ohio 1996). In that Order, this Court explained its reasons for mandating the summary jury trial in this case.

SO ORDERED

Dated: /s/ June 7, 1996
11:15 AM

/s/ S. Arthur Spiegel

S. Arthur Spiegel
United States Senior
District Judge

In re the CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION, INC., Petitioner.

No. 96-3627.

United States Court of Appeals, Sixth Circuit

Decided June 7, 1996

Newspaper petitioned for emergency writ of mandamus requiring district court judge to permit public access to summary jury trial proceeding in class action arising from prison riot. The Court of Appeals, Merritt, Chief Judge, held that newspaper was entitled to emergency writ.

So ordered.

Mandamus -29

Newspaper was entitled to emergency writ of mandamus permitting public access to summary jury trial proceeding in class action arising from prison riot where there was substantial likelihood of success on merits by newspaper, broad public interest was at stake, and secrecy order denying public access could cause irreparable harm and could result in prior restraint prohibited under First Amendment. U.S.C.A. Const.Amend.1; F.R.A.P.Rule 27, 28 U.S.C.A.

John A. Flanagan, Cincinnati, OH, John C. Greiner, Graydon, Head & Ritchy, Cincinnati, OH, for Petitioner

ORDER

MERRITT, Chief Judge.

The petitioner, the Cincinnati Enquirer, a daily newspaper, has filed an emergency petition for a writ of mandamus requiring the Honorable Arthur Spiegel to permit public access to a summary jury trial proceeding now under way in his court in the case of *Morris, et al. v. Voinovich, et al*, No. C-1-93-436. The *Morris* case involves a class action arising from a large prison riot in an Ohio prison. A jury will be empaneled to hear the lawsuit which will be conducted in a regular courtroom in the Cincinnati Courthouse by a federal judge.

A single judge has considered this emergency petition pursuant to Rule 27, Fed. R. App. P. and enters the following order pending final disposition of the case on the merits:

(1) The parties to the case in the court below should file with this court no later than Monday, June 17, 1996, by 5:00 P.M., an answer stating their respective positions in this matter.

(2) Judge Spiegel is requested to file an answer to the petition for writ of mandamus pursuant to Rule 21(b) Fed. R. App. P.

(3) In the interim, prior to a ruling on the merits on the petition for writ of mandamus by the U.S. Court of Appeals for the Sixth Circuit, the district court shall not further conduct the summary jury trial proceedings in the case of *Morris, et al. v. Voinovich, et al., supra*, without permitting public access, including access by the press, to the proceedings.

It is contrary to centuries of Anglo-American jurisprudence to conduct jury trials in secret. The Court finds that there is a substantial likelihood of success on the merits by the petitioner for the writ of mandamus, that a broad public interest is at stake and lends support to the position of the petitioner and that absent such access the secrecy order denying public access may cause irreparable harm and could result in a prior restraint prohibited under the First Amendment should the District Court implement its order of further restraints on publication. *See Brown and Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996). *See also Day v. NLO, Inc.*, 147 F.R.D. 148, 152 (S.D. Ohio 1993). The preliminary conclusion that the petitioner is likely to succeed on the merits on the petition for writ of mandamus is based on the general principle stated in *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980), guaranteeing the public under ordinary circumstances the right to be

present during proceedings in federal court and allowing the closing of a federal courtroom only in the most exceptional circumstances. The district court, therefore, shall not conduct further proceedings in the above-mentioned case while denying public access to the summary jury trial proceeding in question until the U.S. Court of Appeals for the Sixth Circuit has had an opportunity to adjudicate the petition for a writ of mandamus on the merits.

The case of *Cincinnati Gas & Electric Co. v. General Electric Co.*, 854 F.2d 900 (6th Cir. 1988) (a 2 to 1 case with Judge Edwards dissenting), is inconsistent with the *Procter & Gamble v. Bankers Trust case, supra*, and the case of *In re NLO,* 5 F.3d 154 (6th Cir. 1993), which are later cases. This Court had not issued its writ of mandamus in *In re NLO*, 5 F.3d 154, supra, outlawing compulsory summary jury trials in the Sixth Circuit when the *Cincinnati Gas* case was decided. In that case also the district judge had ordered a summary jury trial, and one party was unwilling to participate unless the hearing was closed. Similarly in the present case a party appears willing to participate in the summary jury trial only if the press and the public are excluded. The court held in *In re NLO* that summary jury trials may not be mandated under such circumstances. Moreover, even if the public and the press may be excluded in some circumstances, this does not appear to be such a case. The *Cincinnati Gas* case was a private commercial action, not a class action involving public correctional institutions like the present case.

Accordingly, it is so ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

- - -

DARREN E. MORRIS, et al.,	.	CIVIL ACTION NO. C-1-93-436
Plaintiffs,	.	(In Re:SOCF)
	.	Cincinnati, Ohio
-v-	.	Thursday, June 6, 1996
	.	
GEORGE VOINOVICH, Governor, et al.	.	9:00 a.m.
	.	Conference
	.	Motion by the Cincinnati Enquirer
	.	to Intervene on the Issue of Public Access
	.	
. . . . .	.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONRABLE S. ARTHUR SPIEGEL,
SENIOR JUDGE

TRANSCRIPT ORDRED BY: Messr. Greiner and Flanagan

APPEARANCES:

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and
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For the Intervenor: GRAYDON, HEAD & RITCHEY
BY: John C. Greiner, Esq.
and John A. Flanagan, Esq.
1900 Fifth Third Center

511 Walnut Street
Cincinnati, Ohio 45202

Also Present:	Mr. Ben Kaufman David Lavelle (Extern to J. Spiegel) Monica Williams (Extern to J. Spiegel) Gary Pieples, Esq. (Law Clerk)
Law Clerk:	Amul R. Thapar, Esq.
Court Reporter:	Mary Ann Ranz

- - -

THURSDAY, JUNE 6, 1996

IN CHAMBERS CONFERENCE

(Mr. Gerhardstein was not present during this portion.)

THE COURT: This is an open conference; that is the reason the press is present. They have a right to be here. Otherwise, this would be in the courtroom, and we're trying to get the jury in place. Hearing no objections -- and if there were any, I'd overrule them.

(Laughter.)

THE COURT: Are all parties familiar with what this proceeding is? John, who is going to speak for --

MR. FLANAGAN: Jack.

MR. GREINER: I Will.

THE COURT: Who do you represent?

MR. GREINER: We represent The Cincinnati Enquirer, which is a division of Gannett Satellite Information Network, Inc., Your Honor.

THE COURT: All right. Put on the record what you have in mind so we know.

MR. GREINER: Your Honor, John Flanagan and I are here, as we said, on behalf of Cincinnati Enquirer, which is a division of Gannett Satellite Information Network, Inc. It is our understanding that this Court is about to commence a Summary Jury Trial in the case of In re Southern Ohio Correctional Facility, the class action that is pending before this Court that revolves around certain issues arising from an April 1993 prison riot at the Lucasville Correctional Facility.

It is further our understanding that the Court intends to conduct this Summary Jury Trial proceeding

in a closed session, such that Ben Kaufman, a reporter for The Cincinnati Enquirer, or anyone else on behalf of The Enquirer or any other media outlet, we presume, will be prohibited from attending and reporting on the proceeding.

Your Honor, we believe that this proceeding ought to be conducted in open court, that the freedoms of speech and the press mandate that a proceeding in which jurors are selected and a matter of great public interest in discussed and deliberated, is required to be held in open court. And our authority is the Richmond Newspapers, Inc. versus Virginia, reported at 448 U.S. 555, a 1980 case, wherein the Supreme Court indicated that the First Amendment's guarantees of speech and press, standing alone, prohibited government from summarily closing courtroom doors which had so long been open to the public.

The Sixth Circuit in Brown & Williamson Tobacco Corp. versus F.T.C., reported at 710 F. 2d 1165, indicated that the Richmond Newspapers' standard applies to civil cases as well as to criminal cases.

The Sixth Circuit, in the recent Bankers Trust case, Procter & Gamble versus Bankers Trust, 78 F. 3rd 219, warned against the form of censorship which occurs when publication of a news story is prohibited.

Your Honor, there is authority that you've handed down in the Day versus NLO, Inc. case, 147 F.R.D. 148 --

THE COURT: You realize what happened in the Court of Appeals with regard to my opinion?

MR. GREINER: To the requirement that the Summary Jury Trial be held?

THE COURT: No, they mandamused me. They precluded us from holding it.

MR. GREINER: Your Honor, in fact the discussion in NLO regarding the requirement that the Summary Jury Trial be held in open court and your words on that indicating that given that it was a class action such that class members would have the right at a fairness hearing to object to the settlement, mandated those class --

THE COURT: Your point is those arguments are just as strong here as they were in that case.

MR. GREINER: Absolutely, Your Honor.

THE COURT: Okay.

MR. GREINER: (Continuing) As well as this is effectively a government defendant. Taxpayer dollars would go toward the payment of damages, as well as the type of injunctive relief that is sought, I believe, has impact on corrections policy going forward, which is a matter of legitimate public concern. For all of these reasons, Your Honor, we believe that this matter should be -- should take place and should take place in open court.

THE COURT: Well, I guess we should start first as to what the response is of the plaintiff of the representative class. Who is going to speak?

MR. CHESLEY: Your Honor, we are neutral on it, inasmuch as when we discussed this issue, we took the position that since this was an ADR proceeding and the defendant was prepared to go forward, that we had agreed that it would not be public. We, therefore, I think, need to take a neutral stand so we are neither for nor against the proposition in view of the fact his is a nonbinding ADR, or, for the record, alternative dispute resolution process, and, therefore, there are no state funds, there no state funds, there is no settlement. And as far as the class action piece of it, if and when there is a settlement, the

class is protected by a fairness hearing under 23(e). But we would maintain a neutral position.

THE COURT: All right. Now I'll hear from Mr. Messerman.

MR. MESSERMAN: Thank you.

THE COURT: For the record, you ought to introduce yourself. I'm sure the press doesn't know about your --

MR. MESSERMAN: I'm Gerald Messerman, and I represent the four defendants in this case: Governor Voinovich; Director Wilkinson; Wardens Tate and Collins.

THE COURT: And you were appointed by the Attorney General of Ohio.

MR. MESSERMAN: Yes, I'm serving as Special Counsel for the Attorney General of the State of Ohio.

THE COURT: All right.

MR. MESSERMAN: On behalf of the four defendants, we would oppose the motion in large part for the reasons that were stated earlier when we requested that this hearing be conducted as a closed hearing. I'm somewhat familiar with the cases cited in the motion. To the best of my knowledge, all of those cases deal with trial and do not govern ADR proceedings, nonbinding Summary Jury Trial proceedings.

I represent individuals who in their official capacities are responsible for the administration of 28 penal institutions which house approximately 45,000 inmates. And because of the impact that publicity concerning a nonbinding decision might have, we have asked that this be a closed hearing.

My feelings about the matter have been strengthened, Your Honor, by viewing a 34- or 35-

minute videotape that the plaintiffs intend to use as part of their opening statement in this case. The statement contains an attack on public officials, attributes responsibility for the Lucasville riot and the deaths that occurred there and the property destruction that occurred to the defendants. And we think that publicity concerning this settlement type of procedure could be very disruptive to the entire system.

THE COURT: All right. Any response on behalf of plaintiffs to this? You still take the same position you took before, Stan?

MR. CHESLEY: Your Honor, in view of what we agreed to do, I think we need to take a neutral position --

THE COURT: Okay.

MR. CHESLEY: -- on the basis we had committed to doing this process as not a public --

THE COURT: All right. Well, I feel I've got very mixed emotions about the motion of The Cincinnati Enquirer and Gannett, as everybody in this room would realize. The considerations which I expressed in Day versus NLO, because of the public interest in the litigation, are just as applicable here as they were in Day versus NLO.

At that time, when the Court of Appeals granted defendants' mandamus barring the holding of the Summary Jury Trial under the circumstances that we were going to at that time, which was to be open to the press, the rules had changed -- the rules have changed since then, so that now the Court has the discretion, where at that time it was felt that the Court didn't have the discretion to order it. So, the test that I have to apply to this situation is that of discretion,

whether it would be an abuse of discretion to keep it closed, an abuse of discretion to keep it open.

There are considerations that I think are important that I think all parties should realize. The value of this kind of procedure, a Summary Jury Trial or settlement conference, or whatever, depends very much on the good faith of the parties participating. In order to get the parties to participate in this kind of proceeding, it was agreed by the parties that this would be a closed procedure for settlement purposes. I think that the Court would be breaking faith with the parties if the Court broke its word to the parties that it would be maintained as a closed procedure. That is one of the considerations I must take into account.

At the time I made that promise to the parties, it was obvious to me that the considerations that were mentioned in Day about this being a high profile case from the public interest being very much involved here because of the riot at the Lucasville prison, and the allegations that have been made by the class representatives which are going to be tried in the Summary Jury Trial, have much interest to the State and to the public, as well as to any recovery if there was ever a recovery. Those are all matters of great interest to the public.

Yet, on the other hand, if and when there is a trial of this case, or a settlement is negotiated by the parties after the conclusion of the Summary Jury Trial and further conferences between the parties, that settlement would not be something that would be done in back rooms, as sometimes settlements are negotiated where they're not open to the public and settlement procedures are not open to the public traditionally. Any proposed settlement would have to be made public

and it would be presented at an open hearing for the public to participate in of whether or not it is a fair settlement of the class. I think counsel for Gannett and those present in this courtroom are familiar with that procedure. So, ultimately, if and when a settlement would be developed in this case as an outgrowth of a Summary Jury Trial, the considerations that would be fair or unfair are matters to be in the public record and everyone would have an opportunity to participate.

And, finally, to protect the interests of the press, when I received this motion this morning, I advised counsel for the plaintiff that -- to get word to counsel for the defendant to arrange to have a court reporter present so that the transcript of these entire proceedings will be made and will be sealed, but will be available in the event some court should order that the matter be opened. But that transcript will be available to the press.

MR. CHESLEY: Your Honor --

THE COURT: Excuse me.

MR. CHESLEY: I'm sorry.

THE COURT: (Continuing) That way, there won't be any delay in the procedure, since we have the jury waiting out there. Whatever develops will be available to the press in the event the Court of Appeals, or if you go beyond here, orders that it be made public. But at this point, I feel constrained to continued with the agreement that was made by counsel and that counsel wish the Court to maintain that this remain as a settlement procedure, recognizing that if there is a settlement in this case, all matters relating to that settlement will be open to the public to consider.

MR. GREINER: Your Honor, I think that it's impossible to reconcile your ruling this morning with your ruling in Day versus NLO, number one. I think, number two, you -- this ruling takes us into the territory covered recently by the Bankers Trust matter wherein the parties to the litigation sought to preclude a great deal of information from the public, and the Sixth Circuit was very critical of that effort.

I appreciate your -- the Court's reasoning, the ruling. I feel incumbent to inform the Court and parties we will be immediately petitioning the Sixth Circuit for a writ of mandamus, and I say that to you in the event that causes any disruption. I would ask the Court not commence the proceeding until we have been given an opportunity to be heard in the Sixth Circuit for that purpose. I don't know how the record under seal is going to reflect information -- the videotape that's been -- that's been mentioned here.

THE COURT: Well, the videotape, to answer that, there would be no problem if the Court of Appeals should it would be open court, it would be open from the moment they decided it. And anything that happened before would be available to the press, including the videotape. They would have an opportunity --

MR. GREINER: Your Honor, there is an issue of newsworthiness as well. This is newsworthy. It is happening now. It becomes less newsworthy in two days from now. It becomes much, much less newsworthy one week from no.

THE COURT: I appreciate you telling me, Mr. Greiner, what you're telling me. I have to balance what you're saying against the interest of all the parties ready to proceed this morning, including

we have a jury out here waiting to be impaneled and we're going to be there. Is the court reporter arranged?

MR. CHESLEY: Yes. I didn't mean to interrupt.

The court reporter will be here at 9:30.

THE COURT: Anything that occurs in this court will be transcribed and will be availabe to the press and the public if and when the Court of Appeals should order that the matter should be opened. If the Court Appeals decides that we should stop the procedure based on your filing of your mandamus, obviously I would comply with any order of the Court of Appeals. But I think the bottom line is, that this is a settlement technique to try and help the parties to get some understanding --

(Mr. Gerhardstein entered chambers.)

THE COURT: -- of the magnitude of the problem, the significance of the problems, and how a jury, an advisory jury, may view this to assist them in their determination of whether the case should be settled, should go forward with a full trial, or not. And as I mentioned before, whatever comes out -- if a settlement does develop, the background of that settlement and all the information concerning it would be open to the public at the hearing, fairness hearing, on the proposed settlement since this a class action. I don't know what more I can tell you.

MR. MESSERMAN: Your Honor? May I be heard, Your Honor?

THE COURT: Yeah.

MR. MESSERMAN: On behalf of the defendants, I reluctantly concur with the Movant's position with respect to delaying the proceeding pending whatever proceedings might take place in the

Sixth Circuit. The reason, or reasons are: That the fact that the defendants did not seek to determine the applicability of the Sixth Circuit's decision in Day versus NLO with respect to the power of the Court to order a Summary Jury Trial over the objection of one of the parties in light of the change of the rules was predicated in part upon the understanding that this would be a closed hearing. The Court is certainly keeping faith with that understanding and we don't quarrel with that nor with the plaintiffs. But, because of the enormous implications if this record is to become public prior to trial and prior to a binding trial, we would ask that the proceedings be delayed until there is a resolution of that issue. And, Your Honor, I'm not saying that for the purpose of any tactical advantage or anything else. The interest that I attempted to convey to the Court with respect to the parties and the administration of the prison system in the State of Ohio is one which I am not expert to address but my clients are. And as I advised the Court earlier, it is a matter of very pressing concern to them.

We have a trial scheduled in this case for August 5th. I understand all of the reasons for ordering the Summary Jury Trial. They are eloquently expressed in the Court's Order. And I'm not now questioning those or rehashing those, but the notion was that his would proceed as a closed hearing. And if there is some possibility well prior to August 5th there is going to be a release of this information in a case that is tried without witness representing their own story and presenting themselves for credibility assessment, we think that it could be very disruptive.

MR. CHESLEY: Your Honor, on behalf of the plaintiffs, I believe that Mr. Messerman's motion to

continue this is at best a veiled attempt to stop this, which has been the process of the defendants since the beginning on the Summary Jury Trial.

If we can go back in history -- first of all, we're prepared and ready to go. We've argued these points before. And while the Court agree, it is clear that when the rule changed, NLO was not applicable, and this Court then had the full discretion to have a Summary Jury Trial with or without the parties' permission.

As an accommodation only to the State, we agreed so that we could move it forward, that we would have no problem of it being private because it was an ADR proceeding. That is why we took the neutral position today. But to now use this as an attempt to suggest there is a warranty or a guaranty by some appellate court is really nothing more than a masked means to try to stop the Summary Jury Trial, and we feel the Court's ruling is appropriate under all of the circumstances. And we kept our commitment that that was a way to expedite it, but I do not believe it's appropriate for the State of Ohio to take the notion that if some Court of Appeals at some later time determines it is private, then they don't want to go forward.

THE COURT: All right. I think I understand your point. Do you have anything you want to add?

MR. GERHARDSTEIN: We want to go forward, Judge.

THE COURT: All right. That is Mr. Gerhardstein, for the record. Okay.

MR. GERHARDSTEIN: One little thing to add --

THE COURT: Let me respond to what Mr. Messerman said. The Summary Jury Trial process, and this is for the record so everyone understands, is a

process whereby the testimony that -- the live testimony that would be given on a trial of the merits is related to the jury by the lawyers representing the parties. The process provides specifically that no testimony will be related to a jury that has not already been released or detailed to opposing counsel. In other words, there are to be no surprises in the Summary Jury Trial. The evidence that the summary jury will hear will be the same evidence more or less, probably less evidence, than what the jury would hear in the trial of the merits because it is an abbreviated process. So, I don't believe there is anything that will come out in the Summary Jury Trial that won't come out on the trial of the merits. That is to provide some comfort to defense counsel.

As far as the Court's concerned, I think it is important we proceed with this, particularly in the face of the trial date that we have, to see if there is some way we can get this resolved without more problems in the community and in the State with regard to the correctional facilities we have.

So, the Court's ordering that we proceed with the court reporter present to take down everything. Anything that develops is still considered to be in the nature of a settlement process. If the Court of Appeals decides it should be open or stopped, it's got the power to order the Court to order it what it wants it to do. Meanwhile, what happens -- whatever happens in the courtroom, it is recorded, so that the press, if it's at some time determined to be opened, has the transcript, including any videotapes that are to be viewed by the jury. Fair enough? Okay.

MR. GREINER: Your Honor, I'm sorry. I would just like to -- off the record. This is off the record.

(Off-the-record discussion regarding the Writ of Mandamus.)

- - -

PROCEEDINGS CONCLUDED

- - -

CERTIFICATE

I, Mary Ann Ranz, the undersigned, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/_____
Mary Ann Ranz

No. 96-3635

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: GEORGE VOINOVICH, Governor, State Of Ohio, et al.	)	
	)	ORDER
Petitioners.	)	

Before: GUY, RYAN, and SUHRHEINRICH, Circuit Judges.

In this class action arising from riots that occurred at the Southern Ohio Correctional Facility in April of 1993, the district court ordered the parties to participate in a summary jury trial in an attempt to obtain a settlement of the action. The defendants moved to vacate the order on the grounds that *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993), prohibited compelling a party to participate in a summary jury trial. The district court denied the motion. The defendants agreed not to seek a mandamus to vacate the summary jury trial if the proceedings would be closed to the public. The summary jury trial began on June 6, 1996. The Cincinnati Enquirer then filed a petition for a writ of mandamus seeking to require that the proceedings be opened to the public. On June 7, 1996, a single judge of this court, acting on an emergency basis, issued an order temporarily prohibiting the court from conducting the proceedings

withhout permitting public access. *In re Cincinnati Enquirer*, 85 F.3d 255 (6th Cir. 1996). The district court continued the summary jury trial in opened court.

The petitioners, defendants below, filed this petition for a writ of mandamus seeking to vacate the summary jury trial proceedings because the proceedings were now required to be opened to the public. On June 10, 1996, a single judge of the court issued a stay of the summary jury trial pending consideration of the defendants mandamus petition. Contemporaneously with this order, we are issuing an order in *In re Cincinnati Enquirer*, No. 96-3627, holding that the press does not have the right of access to the summary jury trial, denying that petition for a writ of mandamus, and vacating this court's prior ruling in that case to the contrary. That order renders the defendants objections to the summary jury trial moot.

It therefore is ORDERED that the petition for a writ of mandamus is dismissed as moot.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green

Clerk

96-3635

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: GEORGE VOINOVICH, Governor, State Of Ohio, et al.	)	
	)	ORDER
Petitioners.	)	

Before: MERRITT, Chief Circuit Judge

The petitioners, the Governor of Ohio and other state officials, have filed an emergency Petition for a Writ of Mandamus requiring the Honorable Arthur Spiegel to cease the proceedings in a summary jury trial involving a class action arising from a prison riot in an Ohio prison. The petition for a Writ of Mandamus alleges that Judge Spiegel is requiring the parties to participate in the summary jury trial in violation of this Court's opinion in *Day v. NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993). In light of the opinion in *NLO* and this Court's emergency petition pursuant to Rule 27, Fed. R. App. P. and enters the following orders pending final disposition of the case on the merits:

(1) The parties to the case in the court below should file with this Court no later than Monday, June 17, 1996, by 5:00 P.M. an answer stating their respective positions in this matter.

(2) Judge Spiegel is requested to file an answer to the Petition for a Writ of Mandamus pursuant to Rule 21(b), Fed. R. App. P.

(3) In the interim, prior to a ruling on the merits on the Petition for a Writ of Mandamus by the U.S. Court of Appeals for the Sixth Circuit, the District Court shall not further conduct the summary jury trial proceedings in the case of *Morris, et al. v. Voinovich, et al.*

In *NLO, supra,* this Court ruled in clear and plain language that a district court may not mandate or require the parties to participate in summary jury trials. That is the law in the Sixth Circuit. So long as the opinion in *NLO* remains the law of the Circuit, it is the obligation and duty of district courts within the Sixth Circuit to observe the law and follow it, even though an individual judge may disagree with the opinion. In the federal judicial system, judges of lower courts must observe and follow the precedent of higher courts. The United States Court of Appeals is obligated to follow the precedent of higher courts. The United States Court of Appeals is obligated to follow the precedents of the Supreme Court of the United States, and the district courts in the Sixth Circuit are obligated to follow the precedents of the United States Court of Appeals for the Sixth Circuit.

Accordingly, the District Court shall not conduct further proceedings in the above mentioned case until the U.S. Court of Appeals for the Sixth Circuit has had an opportunity to adjudicate the Petition for a Writ of Mandamus on the merits.

Accordingly, it is so ORDERED

ENTERED BY ORDER OF THE COURT
-- /s/ Leonard Green

Clerk

No. 96-3627

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION, INC.,	)	ORDER
Petitioner.	)	

BEFORE: GUY, RYAN, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green

Leonard Green, Clerk

No. 96-3627

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: THE CINCINNATI ENQUIRER, A Division Of Gannett Satellite Information, Inc.,	)	ORDER
Petitioner.	)	

BEFORE: GUY, RYAN, and SUHRHEINRICH, Circuit Judges.

In *In re Southern Ohio Correctional Facility*, No. C-1-93-436 (S.D. Ohio), a class action arising from riots that occurred at the Southern Ohio Correctional facility in April of 1993, the district court ordered the parties to participate in a summary jury trial in an attempt to obtain a settlement of the action. The petitioner came before this court seeking a writ of mandamus requiring the district court to permit public access to the summary jury trial. On August 1, 1996, the court denied the petition. The petitioner has filed a petition for rehearing and a suggestion for rehearing en banc and now seeks a stay of the summary jury trial schedule for August 14, 1996, pending consideration of its petition.

The factors to be considered by the court in determining whether a stay pending appeal should issue are: 1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the

applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *Michigan Coalition of Radioactive Material Users, Inc. v. Gripentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Upon review, the court concludes that the petitioner has not demonstrated a sufficient likelihood of success on the merits to warrant the issuance of a stay. *See Cincinnati Gas and Electric Co. v. General Electric Co.*, 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 489 U.S. 1003 (1989) (the first amendment right of access does not attach to a summary jury trial.)

It is therefore ORDERED that the motion for a stay of the summary jury trial is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE SOUTHERN OHIO	:	Case No.
CORRECTIONAL	:	C-1-93-436
FACILITY	:	

EXCERPTS OF THE DOCKET

6/6/96	168	MOTION by movant Cincinnati Enquirer to intervene and be heard immediately on the issue of Public Access no pgs: 6) (vp) [1:93cv436]
6/6/96	169	CIVIL MINUTES: First day of Summary Jury Trial before Judge S. A. Spiegel; trial continued to 9:00 am on 6/7/96 (cc: all counsel) (no pgs: 8) (vp) [Entry date 06/05/96] [1:93cv436]
6/7/96	170	TRANSCRIPT of Proceedings filed by Mary Ann Ranz Court Reporter on Motion by Cincinnati Enquirer to Intervene on the Issue of Public Access held on 6/6/96 in a conference before Judge Spiegel (vp) [1:93cv436]

6/7/96	171	CIVIL MINUTES:case called before J. Spiegel for SJT SECOND DAY; trial continued to 9:00 am on 6/10/96 (cc: all counsel) (no pgs: 1) (vp) [Entry date 06/10/96] [1:93cv436]
6/7/96	172	ORDER by Judge S. A. Spiegel granting motion [168-1]; it is ordered that the proceedings be made public for the remainder of the Summary Jury Trial (cc: all counsel) (no pgs: 2) (vp) [Entry date 06/10/96] [1:93cv436]
6/7/96	173	INFORMATION COPY OF USCA 6TH: that the District Court shall not conduct further proceedings in this case while denying public access to the SJT proceeding (vp) [Entry date 06/10/96] [1:93cv436]
6/7/96	174	ORDER OF USCA 6th Cofa number 06-3627 that case in question will not proceed while denying access to the SJ Trial proceedings (no pgs: 2) (vp) [Entry date 06/10/96] [1:93cv436]

6/7/96	175	PETITION for a Writ of mandamus (no pgs: 13+) (vp) [Entry date 06/10/96] [1:93cv436]
6/10/96	176	CIVIL MINUTES: case called before Judge S.A. Spiegel for continuation of Summary Jury Trial; THIRD DAY: jury trial continued until Cofa rules on mandamus (cc: all counsel) (no pgs: 1) (vp) [Entry date 06/11/96] [1:93cv436]
6/10/96	177	MEMORANDUM by plaintiffs in opposition to [150-1] defts motion to review reports and recommendations of the MJ (no pgs: 6+) (vp) [Entry date 06/11/96] [1:93cv436]
6/10/96	178	RESPONSE by plaintiffs to motion for order to address the failure and refusal of pltfs counsel to produce 24 class members for deposition [167-1] (no pgs: 4+) (vp) [Entry date 06/11/96] [1:93cv436]

6/11/96	179	TRANSCRIPT of Proceedings filed by Mary Ann Ranz Court Reporter on Final Pretrial Conference held before J. Spiegel on 5/17/96 (vp) [1:93cv436]
6/18/96	180	REPLY by plaintiff to response to motion in limine [126-1] (no pgs: 13) (vp) [1:93cv436]
6/27/96	181	Interim MOTION by plaintiffs for attorney fees () (vp) [1:93cv436]
7/17/96	182	REQUEST by plaintiffs for orders from Court requiring defts to produce bellwether pltfs listed in doc at commencement of trial 8/5/96 (no pgs: 2) (vp) [Entry date 07/18/96] [1:93cv436]
7/18/96	183	MOTION by plaintiffs for order regarding the use if inmate depos taken by deft (no pgs: 64) (vp) [Entry date 07/19/96] [1:93cv436]

7/19/96	184	PROTECTIVE ORDER by Mag. Judge Jack Sherman upon agreement of parties docs designated by Bates Number produced on 5/30/96 are designated as confidential (cc: all counsel) (no pgs: 1) (vp) [1:93cv436]
7/19/96	185	Addendum/Supplement by plaintiff re request [182-1] (no pgs: 2) (vp) [Entry date 07/22/96] [1:93cv436]
7/19/96	186	MOTION by Plaintiffs to bifurcate trial (no pgs: 2) (vp) [Entry date 07/22/96] [1:93cv436]
7/19/96	187	SECOND AMENDED COMPLAINT by plaintiff; jury demand adding David See, E. Benner , Kevin Clarkson, Jefferson Roy Lewis (no pgs: 18) (vp) [Entry date 07/23/96] [1:93cv436]
7/22/96	188	MEMORANDUM by defendant in opposition to [181-1] (no pgs:

19) (vp) [Entry date 07/23/96] [1:93cv436]

7/29/86	189	REPLY by plaintiff to response to motion for attorney fees [181-1] (no pgs: 35) (vp) [Entry date 07/30/96] [1:93cv436]
7/30/96	190	ORDER from Cofa that District Court shall not conduct further proceedings until Cofa has had an opportunity to adjudicated the Petition for a Writ of Mandamus on the merits (order was originally filed in Cofa on 6/10/96) (cc: all counsel) (no pgs: 2) (vp) [1:93cv436]
8/1/96	191	ORDER of USCA 6th: petitioners writ of mandamus is dismissed as moot (no pgs: 3) (ah) [Entry date 08/02/96] [1:93cv436]
8/1/96	192	ORDER entered by COFA-Mandamus denied (cc: all counsel) (no pgs: 2) (ah) Entry date 08/02/96] [1:93cv436]

8/13/96	193	MOTION by intervenor Cincinnati Enquirer to intervene and to stay summary jury trial pending petition of Cincinnati Enquirer for Sixth Circuit rehearing and suggestion for rehearing en banc (no pgs: 3+) (vp) [1:93cv436]
8/13/96	194	WRIT of Habeas Corpus Ad Testifcandum issued to Warden Lucasville Correctional Instit from J. Spiegel ordering Eugene K . Adams currently restrained in custody to be appear before this Court 8/14/96 at 9:00;after conclusion of proceedings pltf is to be returned to LCI (no pgs: 1) (vp) [1:93cv436]
8/13/96	195	WRIT of Habeas Corpus Ad Testifcandum issued to Warden Lebanon Correctional Instit by J. Spiegel to have Darrin E. Morris to appear before this Court 8/14/96 at 9:00;after conclusion of proceedings pltf is to be returned to Lebanon Correctional Instit (no pgs: 1) (vp) [1:93cv436]

8/14/96	196	CIVIL MINUTES: Proceeding before Judge S.A. Spiegel for continuation of SJT; FOURTH DAY; SJT cont to 9:00 8/15/96 (cc: all counsel) (no pgs: 1) (vp) [Entry date 08/15/96] [1:93cv436]
8/15/96	197	ORDER by Juge S.A. Spiegel that USM is to provide lunch and or refreshments for the jury (cc: all counsel) (no pgs: 1) (vp) [1:93cv436]
8/1/596	198	CIVIL MINUTES: Proceeding before Judge S.A. Spiegel; SJ trial continued Fifth Day; trial concluded (cc: all counsel) (no pgs: 1) (vp) [Entry date 08/16/96] [1:93cv436]
8/16/96	199	ORDER by Judge S.A. Spiegel denying motion to intervene [193-1], denying motion to stay summary jury trial pending petition of Cincinnati Enquirer [193-2] (cc: all counsel) (no pgs: 4) (vp) [1:93cv436]

8/20/96	200	INFORMATION COPY of USCA 6th: Petition for mandamus is denied (ah) [1:93cv436]
8/21/96	201	ORDER OF USCA 6th: (no pgs: 2) mot. for a stay of the summary jury trial is denied. (ah) [1:93cv436]
8/29/96	202	MOTION by defendants George V. Voinovich , Reginald Wilkinson, Terry Collins, and Arthur Jr. Tate for sanctions in favor of defts and against pltfs in connection with pltfs continued prosecution of claims against George Voinovich (no pgs: 9) (vp) [1:93cv436]
8/29/96	202	MOTION by defendants George V. Voinovich , Reginald Wilkinson, Terry Collins, and Arthur Jr. Tate for sanctions in favor of defts and against pltfs in connection with pltfs continued prosecution of claims against George Voinovich (no pgs: 9) (vp) [1:93cv436]

8/29/96	203	MOTION by defendants George V. Voinovich , Reginald Wilkinson, Terry Collins, and Arthur Jr. Tate for sanctions in favor of defts and against pltfs in connection with pltfs continued prosecution of claims against Terry Collins (no pgs: 9) (vp) [1:93cv436]
9/3/96	204	MOTION by defendants in limine to exclude evidence relating to any claim for Hedonic damages on behalf of deceased class members (no pgs: 6+) (vp) [1:93cv436]
9/10/96	205	NOTICE of hearing; Settlement conference set for 2:00 9/19/96 before J. Spiegel in Rm 838 (cc: all counsel) (no pgs: 4) (vp) [Entry date 09/11/96] [1:93cv436]
9/19/96	206	MEMORANDUM by plaintiffs in opposition to [204-1] defts motion in limine to exclude evidence relating to any claim for Hedonic damages on behalf

		of deceased class members (no pgs: 4) (vp) [1:93cv436]
9/19/96	207	MEMORANDUM by plaintiffs in opposition to [203-1] and [202-1] motions for sanctions (no pgs: 10) (vp) [1:93cv436]
10/9/96	208	ORDER OF USCA 6th (no pgs: 1) MANDATE ISSUES pursuant to 8/1/96 order (ah) [Entry date 10/11/96] [1:93cv436]

(2)

Supreme Court, U.S.
FILED
JAN 22 1997
CLERK

No.96-1032

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IN RE: THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION NETWORK, INC.,

Petitioner.

On Petition of a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

Brief In Opposition To Writ of Certiorari

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QUESTION PRESENTED

Whether the lower court properly held that the petitioner, a member of the press, had no First Amendment right of access to a private and non-public settlement negotiation proceeding known as a "summary jury trial".

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IN THE

Supreme Court of the United States

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IN RE: THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT SATELLITE INFORMATION NETWORK, INC.,

Petitioner.

On Petition of a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

Brief In Opposition To Writ of Certiorari

Respondents, Plaintiffs' Class Morris, et al., oppose the Petition for a Writ of Certiorari.[1]

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[1] Respondents have no Rule 29.1 parent companies or subsidiaries.

SUMMARY OF REASONS FOR DENYING THE WRIT

No compelling reason exists to grant the petition for a writ of certiorari. The decision of the Court of Appeals for the Sixth Circuit denying the respondent, a member of the press, access to a private, non-public settlement negotiation procedure is not in conflict with relevant decisions of the United States Supreme Court or of another United States Court of Appeals. Petitioner's argument that denial of access violated its First Amendment right of access to civil jury trials is meritless. Further, the facts underlying this petition are so particular to this matter that the case is not suitable for review by the Supreme Court, to wit: the parties to a class action litigation pending in the Southern District of Ohio, Western Division, elected to proceed with a confidential settlement negotiation technique in order to attempt to resolve specific issues of disagreement which had proven to be obstacles to a negotiated resolution of the litigation; and confidentiality was requested by the State of Ohio and agreed to by the plaintiffs' class to accomodate the State of Ohio's legitimate concern that public access to the settlement procedure could prove disruptive to the operations of Ohio's 28 correctional institutions, housing 45,000 inmates and, in particular, the Southern Ohio Correctional Facility, which is Ohio's maximum security prison and the location of the inmate riot that is the subject matter of the litigation.

REASONS FOR DENYING THE WRIT

I. THE FIRST AMENDMENT RIGHT OF ACCESS DOES NOT ATTACH TO SETTLEMENT NEGOTIATION PROCEDURES.

In accordance with its prior decision rendered in Cincinnati Gas & Electric Co. v. General Electric Co., 854 F.2d 900 (6th Cir. 1988), cert. denied, 489 U.S. 1003 (1989), the Court of Appeals for the Sixth Circuit ruled in the instant matter that the First Amendment right of access did not attach to the summary jury trial which was proceeding before the lower court as a private, non-public settlement negotiation procedure.

In so deciding, the Court of Appeals properly analyzed the issue of whether petitioner should be accorded a First Amendment right of access, by applying the two-step review process set forth in Press-Enterprises Co. v. Superior Court, 106 S.Ct. 2735 (1986). The issues addressed were whether the proceeding was one for which there has been a "tradition of accessibility", and whether access "plays a significant positive role in the functioning of the particular process in question." Press-Enterprises Co. v. Superior Court, 106 S.Ct. at pp. 2741, 2742. The questions were answered in the negative. First, the Court of Appeals ruled that the summary jury trial proceeding was not in the nature of a court hearing or a jury trial, but was instead essentially a settlement proceeding.[2] Settlement proceedings are historically closed

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[2] A summary jury trial lacks the procedural safeguards that are necessary to fairly adjudicate a claim. In the Southern District of Ohio, Western Division, the attorneys representing the parties present selected, limited evidence using summary formats. There is no live testimony and no cross-examination and thus no testing of credibility. At times, as in the instant matter, not all named defendants participate

procedures. Cincinnati Gas and Electric Co. v. General Electric Co., 854 F.2d at p. 903; Palmieri v. New York, 779 F.2d 861, 865 (2nd Cir. 1985). The proceeding did not present any matter for adjudication by the court, but functioned to facilitate settlement. Then, in accordance with its prior ruling in Cincinnati Gas & Electric Co. v. General Electric Co., 854 F.2d at p. 904, the Court of Appeals for the Sixth Circuit found that "where a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement." In the instant matter, the interest in confidentiality was highly legitimate. The State of Ohio was reasonably concerned that public access to this settlement procedure could prove dangerously disruptive to the operations of Ohio's 28 correctional institutions. In particular, the parties were particularly cognizant of the potential for disruption at the Southern Ohio Correctional Facility, which is Ohio's maximum security facility and the location of the actual inmate riot that was the subject matter of the litigation.

The Court of Appeals did not err in determining that petitioner did not have a First Amendment right of access to the summary jury trial. As such, the petitioner's writ of mandamus was properly denied as "[t]he remedy is to be

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in the summary jury trial. The procedure used is extremely similar to that used in mock jury trials often undertaken privately by a party to a litigation prior to trial in order to determine strengths and weaknesses of a case. The summary jury trial procedure also deals only with selected issues central to meaningful settlement discussions. Many issues and claims, for the sake of simplicity, are deleted in the summary proceeding. The jury answers special interrogatories in lieu of issuing an actual verdict, many of which are drafted to be advisory in nature. The jury is also asked to award damages even in the absence of liability. The results are non-binding.

invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." In re NLO, Inc., 5 F.3d 154, 156 (6th Cir. 1993); In re Gillis, 836 F.2d 1001, 1012 (6th Cir. 1988); In re Bendectin Prods. Liability Litig., 749 F.2d 300, 303 (6th Cir. 1984). Petitioners failed to show such an indisputable right of access.

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated January 22, 1997

Supreme Court, U.S.
FILED
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No. 96-1032

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

THE CINCINNATI ENQUIRER, etc.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondents are four Ohio government officials: George Voinovich, the Governor of Ohio; Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Corrections; Arthur Tate, Warden; and Terry Collins, Warden. They are responsible for the administration of 28 penal institutions located in Ohio, which house approximately 45,000 inmates. *See* Petition 18a. In that capacity they were parties to the underlying litigation in this case, in which a class of prison inmates sued them for injuries and damages arising from a riot at one of Ohio's prisons. They were represented by the Ohio Attorney General in that action, and they are represented by her in opposing this Petition.

In the underlying litigation, Respondents agreed to proceed with alternative dispute resolution efforts in the case, specifically a non-binding summary jury trial, on the condition that the proceeding be a closed hearing. Their fear in making public the summary jury trial was that it would be disruptive to the present and future administration of the prison system. All parties to this proceeding agree that the purpose of the summary jury trial in this case was to facilitate settlement of the underlying lawsuits against the State respondents. That purpose, it now appears, has been fulfilled. As reported by Petitioner on January 22, 1997, the underlying lawsuit will be settled for $4.1 million. *See* Appendix A-1.

REASONS FOR DENYING THE WRIT

A. There is no Lower-Court Conflict of Authority.

Conspicuously missing from the Petition is any argument that the lower courts are struggling with the issue presented. Petitioner does not allege, let alone begin to establish, a lower court split of authority. Indeed, from all

that appears in the Petition, the First Amendment right of access to summary jury trials is a matter that has been addressed by one federal judge in one district court (Spiegel) and one circuit court (Guy, Ryan, Surheinrich). And even they were all of one mind. Review of the issue at this point, in other words, is premature. The issue should be allowed to percolate in the lower courts where, if Petitioner is correct about the significance of the issue and the frequency with which it comes up, additional decisions will be issued and possibly even a division of authority will arise.

B. This Case Does Not Present a Good Vehicle for Addressing the Question Presented.

Even overlooking the lack of a lower-court conflict and even assuming the significance of the federal question presented, the Petition is not worth granting. The purpose of a summary jury trial, as Petitioner itself acknowledges, is to facilitate the settlement of cases. Petition 13. That purpose now appears to have been fulfilled, making this case far less of a live controversy than it was last summer. As reported by Petitioner, the State has agreed to settle with the inmates for $4.1 million. As a result of that settlement, there is no longer a live dispute between the parties to the underlying litigation. Under these circumstance, it is not clear whether Petitioner's First Amendment right of access claim retains any vitality. At most, they could now attempt to seek access to the sealed transcript of the summary jury trial in order to provide after-the-fact reporting on the case. While that interest may suffice to create an Article III case or controversy, it is a long way from the kind of concrete, ongoing dispute that normally warrants the Court's attention.

C. The Sixth Circuit's Decision is Consistent With This Court's Precedents.

At any rate, the lower courts correctly resolved the question presented, making it even less imperative to review this issue further. In doing so, the Court adhered to this Court's time-tested analytical framework for resolving right-of-access cases under the First Amendment. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*") Under that framework, a claim of access involves two "complimentary considerations." First, the proceeding must be one for which there has been a "tradition of accessibility." *Id.* at 8. Second, public access must play a "significant positive role in the functioning of the particular process in question." *Id.* Even if these elements are satisfied, the right of access is qualified, and may be outweighed by a strong interest in maintaining the confidentiality of the proceedings. *Id.* at 10-11. As the lower courts correctly recognized, each of the elements outlined in *Press-Enterprise II* is lacking in this instance.

To begin with, there is no tradition of access to summary jury trials. They are devices to aid the settlement of disputes. *See* Lambros, *The Summary Jury Trial, A Report to the Judicial Conference of the United States*, 103 F.R.D. 461, 465 (1984). And settlements have historically been closed to the press and public. *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985); *Cincinnati Gas and Elec. Co. v. General Elec. Co.* 854 F.2d 900, 903-904 (6th Cir.1988).

Despite superficial similarities to a jury trial, the summary jury trial is fundamentally different. The mock jurors are given the evidence in summary form, do not hear live witnesses, and sometimes hear evidence that would be inadmissible at a real trial. *See Cincinnati Gas and Electric,*

854 F.2d at 904; *The Summary Jury Trial*, 103 F.R.D. at 483-84; Spiegel, *Summary Jury Trials*, 54 U.Cin.L.Rev. 829, 830-31 (1986). Although they render a "verdict," it is not binding on the parties, and serves only to facilitate pretrial settlement of the litigation "much like a settlement conference." *Cincinnati Gas and Electric*, 854 F.2d at 904.

More fundamentally, the summary jury trial does not present the Court with any matter for adjudication, nor does it have a final and decisive effect on the outcome of the case. *In re the Cincinnati Enquirer*, 94 F.3d 198, (6th Cir. 1996); *Cincinnati Gas and Electric*, 854 F.2d at 904. The jury renders only an advisory verdict, and the parties' rights to a full trial *de novo* remain unaffected. *The Summary Jury Trial*, 103 F.R.D. at 482. The "tradition of accessibility" element of the *Press-Enterprise II* analysis clearly has not been met in this case.

Nor is the second criterion present. The State Respondents specifically agreed to the summary jury trial only on the condition that it be held in confidence. Petition 20a. When the court was ordered to conduct the summary jury trial in public, the State Respondents were granted a writ of mandamus to stop the summary jury trial altogether. Petition 31a. As the court stated in *Cincinnati Gas and Electric*, 854 F.3d at 904, "where a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement." Indeed the parties cannot be forced to engage in a summary jury trial, *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993), and will be less likely to agree to such a procedure if confidentiality is denied.

Finally, the cases relied on by Petitioner for a contrary view are inapposite. All address the First Amendment right of access to criminal jury trials, not civil

settlement procedures. *See Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 (1980) (dealing with public and press access to a criminal trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (dealing with access to criminal trials involving sex offenses); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (dealing with right of access to the voir dire of potential jurors in a criminal case); *Press-Enterprise II*, 478 U.S. 1 (dealing with right of access to preliminary criminal hearings).

CONCLUSION

For the foregoing reasons the writ should be denied.

Respectfully submitted,

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APPENDIX

The Cincinnati Enquirer
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INMATES SETTLE FOR $4.1 M
Award for Lucasville riot victims is largest ever

By Ben L. Kaufman
The Cincinnati Enquirer

The state will pay $4.1 million to settle claims by inmate victims of the 1993 Lucasville uprising.

It will be the largest post-riot award to prisoners anywhere in the country, Cincinnati lawyer Alphonse A. Gerhardstein, who was lead attorney, said Tuesday.

The settlement is small compared to the more than $50 million Ohio promised to spend to settle a separate class action Mr. Gerhardstein brought to improve inmate psychological services.

He said a court-appointed claims administrator would send payments to more than 400 prisoners whose property was trashed largely by guards, to more than 50 inmates injured in the riot and aftermath, and to families of nine inmates murdered by fellow prisoners.

Assuming U.S. District Judge S. Arthur Spiegel approves the settlement, Mr. Gerhardstein said checks should go out before year's end.

"Every inmate who was trapped in the riot should get some money, and they won't," Mr. Gerhardstein said. "We got the people who were seriously harmed."

No money will go to inmates convicted of crimes related to the Easter riot or 11-day uprising, the longest in American history, he added.

Since it cost less than a trial and appeal, the

settlement was "in the best interests" of the citizens of the state, the Department of Rehabilitation and Correction (DRC), and the Southern Ohio Correctional Facility in Lu-
(Please see LUCASVILLE, page B6)

Lucasville: Inmates settle for $4.1M
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casville, DRC Director Reginald Wilkinson said.

Mr. Gerhardstein, a veteran inmate advocate, led a legal powerhouse team assembled by the court to represent the inmates. Others were civil rights attorney Marc D. Mezibov, class action specialist Stanley M. Chesley and lawyers in his office, and litigator Neal Baker from Dinsmore & Shohl.

Of the $4.1 million, at least $300,000 will reimburse lawyers for their out-of-pocket expenses, plus $1.4 million to cover their fees at normal hourly rates.

The rest will go to the inmates, less the costs of administering the claims, Mr. Gerhardstein said, "and everybody is committed to keeping this as small as possible."

Judge Spiegel held a closed summary jury trial in August to promote a settlement. Both sides present their evidence and arguments, and jurors reached an advisory verdict.

None of the lawyers would confirm that the inmates won, but Mr. Gerhardstein said the verdict helped both sides appreciate what was feasible. In that sense, he said, it moved them closer to the settlement urged by Judge Spiegel.

More important are improvements in prison life that the state promises to make in the settlement, Mr. Gerhardstein said.

These include a limit on one inmate per cell for maximum-security prisoners. Before the riot, two sometimes-hostile maximum-security prisoners were housed in each one-man Lucasville cell.

The state also pledged to refine inmate classifications, speed transfers from Lucasville for inmates whose classifications are upgraded from maximum security, and to address parole problems for inmate victims of the riot.

Further improvements include a fair procedure for hearing allegations of inmate rule violations, better mental health care for inmate riot victims, programs to improve racial and cultural relations, and at least 40 hours a week out of cells for all Lucasville inmates.

Mr. Gerhardstein said Ohio promised to reconsider its directives on inmate religious practice. This will help prison staff recognize and accommodate sincerely held but unconventional beliefs and support chaplains and other who must cope with unfamiliar demands and faiths embraced by prisoners.

Finally, Mr. Gerhardstein said, the state promised to study the ways inmates adjust -- or fail to accommodate -- to long sentences.

The settlement is to be filed with Judge Spiegel today. A fairness hearing could come by early April after inmates have had the 60-day comment period required in any class action settlement.